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IN THE

Supreme Court of the United States

October, 1968, Term

NO. 1311

LESTER NEHRING, *Petitioner*

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL, *Respondents*

v.

STRACHAN SHIPPING COMPANY, *Third Party Respondent*

RESPONDENTS' REPLY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

Once again the Plaintiff, this time as Petitioner before this Court, presses for a review of an adverse result obtained following a jury trial of an ordinary longshoreman's third party action against the vessel owner in which the stevedore was impleaded. Petitioner Nehring, an employee of Third Party Respondent, Strachan Shipping Company,

an independent contracting stevedoring company, alleged that he sustained injuries on January 9, 1964, while performing work as a longshoreman on board the S/S RIO BERMEJO owned and operated by Respondent, Empresa Lineas Maritimas Argentinas. The case was submitted to the jury upon special interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. The jury considered the first Interrogatory which inquired as to whether or not the Plaintiff had sustained an injury while working on board the S/S RIO BERMEJO on or about June 9, 1964, and the jury duly answered that Lester Nehring did not sustain an injury. In view of the jury's answer to the first interrogatory, it was unnecessary for the jury to consider or answer the remaining interrogatories. Final Judgment denying the claim of Petitioner, Lester Nehring, against the shipowner as well as the shipowner's claim against the stevedore was entered by the trial court. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit where the judgment of the trial court was affirmed per curiam. A Petition for Rehearing before the Court of Appeals was also denied.

Petitioner urges no issue before this Court which has not been fully considered and disposed of below, nor does Petitioner raise any legal questions for this Court's determination. Indeed, the jury verdict in the case is readily explained by the fact that the jury did not believe the inconsistent accounts of the Plaintiff or his supporting witnesses as to what occurred. The record of the proceedings approximating 635 pages reflects the highly suspect nature of Plaintiff's contentions which caused the jury to waste no time in its deliberations in reaching and rendering a unanimous verdict within a space of 35 minutes.

II.

OPINIONS BELOW

There is no written District Court opinion. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit affirming the trial court is reported in 401 F.2d 767 (5th Cir., 1968) and is set forth in Appendix A. The denial of the Petition for Rehearing was not published, but is set forth in Appendix B.

III.

QUESTIONS PRESENTED

The questions now raised by Petitioner which the lower courts have properly considered and decided adversely to the position of Petitioner are the following:

1) Can the Court be accused of abusing its judicial discretion pursuant to statute when it permitted the Defendant-shipowner and the Third Party Defendant-stevedore each to exercise three peremptory challenges and denied Plaintiff's Motion to Sever the Indemnity Action from the basic suit?

2) Can the Plaintiff, Lester Nehring, be heard to complain of an adverse jury verdict by attacking the Court's instructions to the jury when the context in which the term "sustained an injury" was considered by the jury after hearing all of the evidence was unqualifiedly clear from the record of the trial?

Respondents respectfully submit that the answer to both inquiries is no, that both the jury verdict in the District Court and its affirmance by the Court of Appeals were correct and that the Petition for Writ of Certiorari should summarily be denied.

The first question places Petitioner in the position of attacking the District Court's exercise of its discretion. Against a background of a trial in which the credibility of Petitioner's entire case was fatally undermined by the developments in the proof, Petitioner now seeks to blame the result on the trial judge for the manner in which he applied the applicable statute as to peremptory challenges in jury selection (28 U.S.C.A. §1870) and Rule 42(b) of the Federal Rules of Civil Procedure pertaining to separate trials. By their very language both are discretionary, and, as the Court of Appeals properly observed, there was no abuse of discretion.

The answer to the second question reveals the key to the outcome of the lawsuit. The theory of the defense was that there never was an accident or event or occurrence as and when alleged by Petitioner. Such theory was strengthened early in the case when Petitioner and certain of his supporting witnesses were exposed and divested of their credibility as they gave strikingly different accounts of the incident itself. Petitioner now seeks relief by leveling charges that the first and only Interrogatory answered by the jury was susceptible to confusion. As the Court of Appeals pointed out, "the argument (of Petitioner) is that the jury decided that there was 'no injury' without understanding what 'injury' meant." The jury understood perfectly well, but it could never generate any confidence in Plaintiff's case. The pattern of the course of the trial including the paramount inquiry consistently being made of the jury as to whether or not an accidental injury had taken place is readily seen from a brief reference to the record:

As to the opening remarks of counsel, the course of the evidence focused on one critical question for the jury to resolve—was there a "happening"? Was there an event?

Did an accidental injury take place? Did something occur to Plaintiff, either by slipping or falling? Petitioner's counsel in his opening statement indicated that "incidentally, he slipped, he fell, he injured himself while in this area because of these conditions" (R. 15). Counsel for Respondents asserted that "we deny that this man sustained an accident on this ship" (R. 18). It was also asserted by counsel for Respondents that "we, of course, deny that the Plaintiff is entitled to $250,000 or $250 for something that we say never happened" (R. 20, 21). The position was stressed that whatever disability Nehring had was related to other accidents and other injuries occurring prior to and subsequent to this alleged occurrence (R. 25).

As for the version of Petitioner and his witnesses concerning the accident itself, it was never a believable one. The only thing that Petitioner could "figure out" was that he slipped on the deck in loose bone meal and went down with the sack (R. 44). He conceded that he gave a statement a few days after the accident in which he stated that he was walking on some bags (R. 115) and that he did not report the accident for several days (R. 88-90). The testimony of the supporting witnesses leads to the unqualified conclusion that liberties were being taken with the truth (R. 139-140, 157-159, 187-188). A shadow was thereby cast over their credibility which was never removed. One had Petitioner walking on a tier of bags until he stepped on the midship coaming and slipped (R. 152); another had him walking some place, although the answer isn't clear (R. 173-174); another had the gang working on the floor or deck (R. 183). All three witnesses saw Petitioner as he was falling, but one said that Nehring fell backwards (R. 152), and another said that Nehring fell forward (R. 173). The cavalier respect for

the truth of these witnesses was not lost on the jury. Their testimony was simply unworthy of belief. The central theme which had already stood out as being the real issue for resolution by the jury was thus magnified many times. Did the accident actually happen or didn't it? This was what concerned the jury, and indeed it could not have been otherwise.

The arguments of counsel following the close of the evidence underscored the clarity with which the jury was caused to view the case. Counsel for Petitioner stated "now I say the first Interrogatory is whether or not Mr. Nehring was injured. I think the answer to that is yes". (R. 491). Counsel described again the work that was going on "when this occurred" (R. 492). Once more the theme was pursued by Petitioner's counsel in arguing that Petitioner "slipped and fell at the time" (R. 492). In striking contrast counsel for the Respondents emphasized the irreconcilable conflicts which placed Petitioner's case in serious jeopardy. These instances of obvious inconsistencies are capsuled in the record of the trial. (R. 526-529). Counsel for the Respondents summed up the case as he saw it when he stated that his convictions that the accident never happened had grown sounder as the evidence developed (R. 519). Counsel for Third Party Respondent also stressed the question as to whether or not Nehring sustained an injury on board the ship. (R. 550, 554-556). In rebuttal, counsel for Petitioner argued "now we go right down the line to the question of whether or not he got hurt on the job . . . what we are trying to do is find out what the facts are" (R. 589). Counsel then closed by stating "it is more likely true that Mr. Nehring was injured as he said he was when he said he was . . ." (R. 595).

Having heard the testimony and the arguments of counsel, the jury at last was called upon to perform its function in the light of the Court's charge. The flow of proof had not deviated to alter the crucial issue in the case, nor did the positions of the parties evidence any change. Call it an event, call it an accident, call it an injury, or call it an accidental injury, the jury in hearing this case had no opportunity to stray or become confused as to what constituted the key issue in the case. It is in this context that the Court's charge to the jury when tailored to the evidence leaves no doubt as to its correctness. The first Interrogatory upon which all succeeding interrogatories are conditioned is susceptible of no confusion. As the Court indicated, "if you answer Interrogatory No. 1 in the negative, you need not answer any of the following interrogatories." (R. 610). It is only if the jury had answered Interrogatory No. 1 affirmatively that the subsequent Interrogatories as to unseaworthiness, negligence, contributory negligence, percentage of Plaintiff's contributory negligence and finally damages broken down into six separate elements required consideration by the jury (R. 608-609).

The test of the Court's charge necessarily is whether or not on the particular record of the trial involved, the jury had full latitude to exercise its function and do what it wanted to do. There is no question but that the jury did exactly what it wanted to do in this case and that it did so with dispatch.

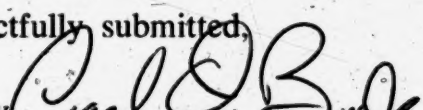
IV.

CONCLUSION

Respondents, Empresa Lineas Maritimas Argentinas, et al, respectfully submit that the Court of Appeals was correct in affirming the jury verdict rendered in the trial

court based upon a hearing of all the evidence and that such verdict was amply supported by the overwhelming evidence contained in the record. The result in this case turns in every material respect purely upon fact findings or the proper exercise of the discretion of the trial court pursuant to statute or rule. Certainly, none of the criteria listed in this Court's Rule 19 are remotely involved, nor would this Court's review of the record and opinion as to the facts it presents be of any value to pending or future litigation. There is no conflict with a decision of another Court of Appeals, nor is this decision in conflict with the Federal law or with applicable decisions of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By 

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V.

PROOF OF SERVICE

I, Carl O. Bue, Jr., attorney for Respondents being a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Reply in Opposition to the Petition for Writ of Certiorari upon Mr. W. Jiles Roberts, Counsel for

Petitioner, by mailing three copies thereof postage prepaid addressed to his office in the Americana Building, Houston, Texas, 77002, and that I have also served copies upon Messrs, Eikel & Goller, Counsel for Third Party Respondent, by mailing three copies thereof postage prepaid, addressed to their offices, 205 Oil & Gas Building, Houston, Texas, 77002, dated this 23rd day of June, 1969.

Carl O. Bue, Jr.

CARL O. BUE, JR.

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 25,197

LESTER NEHRING,

Appellant,

versus

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(October 7, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: Appellant Nehring allegedly sustained injuries on January 9, 1964, while working as a longshoreman on the S/S RIO BERMEJO, owned and operated by Appellee Empresa Lineas Maritimas Ar-

gentinas. At the time of the alleged accident, appellant was an employee of Strachan Shipping Company, an independent contracting stevedoring company. Appellant brought suit against the shipowner for negligence and vessel unseaworthiness. The shipowner subsequently impleaded the stevedore employer on the theory that, if the ship was to be cast in liability which it denied, such resulting liability stemmed from the stevedore's breach of its warranty of workmanlike service owed to the vessel in the performance of its operations.

Prior to the commencement of the jury trial, appellant moved the trial court to equalize the peremptory challenges, i.e. to give the appellant the same total number of peremptory challenges that appellees were given. If not given equal challenges, appellant alternatively asked that the shipowner's third party action against the stevedore be severed. Appellant's motion was denied; appellant was given three peremptory challenges; and appellees were each allowed three challenges to be exercised without conferring and with no collusion between them. The appellant claims this was an abuse of the discretion given the trial court in 28 U.S.C. § 1870 (1964). There is no merit to this contention.

Following the presentation of the evidence and arguments, the court submitted the case to the jury upon special interrogatories. The first interrogatory read: "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964?" The jury answered "no" and obviously did not have to go further. Appellant's second contention on appeal is that the trial court erred in not defining, as requested, "injury" as an aggravation of a pre-existing con-

dition, for it was this type of injury about which appellant offered proof. The argument is that the jury decided there was "no injury" without understanding what "injury" meant.

This confuses the purpose of interrogatory number one, as a close reading of the record will reflect. The theory of the defense was that there was never any accident or event or occurrence as and when alleged by appellant: the shipowner's trial counsel said in his opening argument "We deny that this man sustained an accident on this ship." (R. 18). During the trial of the case, it was to prove or disprove the alleged accident that most of the evidence was offered; and this question was reemphasized during closing arguments of counsel, particularly by appellees. (R. 519). Thus, the crucial issue joined and argued in the trial below was whether or not there was an incident as alleged by appellant.

It was to present this issue to the jury that the trial judge submitted interrogatory number one. (R. 448); and to understand and answer it the jury needed no definition of injury. Extent or type of injury was not the inquiry. There being no need to define injury, this court finds that the jury was fairly instructed.

AFFIRMED.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 25197

LESTER NEHRING,

Appellant,

versus

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(December 5, 1968)

ON PETITION FOR REHEARING

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.